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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1272

GEORGIA POWER COMPANY, - - Petitioner,

versus

CIMARRON COAL CORPORATION, - Respondent.

On Petition For Writ of Certiorari to the United States Court of Appeals For the Sixth Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1272

GEORGIA POWER COMPANY - - - - *Petitioner,*

v.

CIMARRON COAL CORPORATION, - - - *Respondent.*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

The Respondent, Cimarron Coal Corporation, respectfully urges that the Petition for Writ of Certiorari should be denied.

Judgment was entered December 9, 1975, upon the Opinion of The United States Court of Appeals For The Sixth Circuit and issued as Mandate on March 5, 1976 (A C-3, *infra*). No rehearing or reconsideration of the Court's Judgment has been sought, or, stay of Mandate applied for, by Petitioner under 28 U.S.C., Section 2101 as provided in Rule 41 Federal Rules of Appellate Procedure and Rule 51 of this Honorable Court.

The Respondent cannot proceed to arbitration with Petitioner in accordance with the Mandate in view of the pending Petition for Certiorari for which the lower Courts have recognized deference.

Respondent accepted and accepts the Opinion and Judgment of The Court of Appeals upon the appeal and cross-appeal in the lower Court *upon equitable principles* because the application by the Trial Court of its historic equity powers in the declaratory judgment action under 28 U.S.C., Sections 2201 and 2202, despite the remedies at law sought by both Petitioner and Respondent, in order to mold its decree as to do complete justice and declare the existence or non-existence of any right, duty, status and other legal relations of the parties or of any fact upon which such legal relations depend appeared proper whether or not further relief is or could be sought. Cf. Rule 57, Federal Rules of Civil Procedure; Supreme Court Advisory Committee, Sub. Rule 57.

A failure to apply for stay clearly invites uncertainty as to the filing of a Cross-Petition and if this Court should grant the Petition upon strict legal principles then the legal issue with respect to Petitioner's admitted refusal to arbitrate as a condition precedent to any legal remedy and Respondent's right to rescind therefor are so interrelated that special and important reasons exist for this Court to focus its attention to those issues and exercise its sound discretion to review the entire case to avoid injustice to Respondent. A summary of cases upon these issues will appear at the Conclusion to this Brief.[1]

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[1]Cf. Stern, When To Cross-Appeal or Cross-Petition—Certainty or Confusion? 87 Harvard L. Rev. 763 (1974); Rule 19, permits this Court to determine the scope and extent of its review where prejudice is likely to result; *Dandridge* v. *Williams*, 397 U. S. 471, 90 S. Ct. 1153 (1970).

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This litigation at the Trial level, involved four (4) hearings; over sixty-one (61) exhibits and testimony *ore tenus* covering the period April, 1970 to November, 1974, all of which is presented in two (2) printed volumes and one (1) transcript (April 11, 1975) containing over eight hundred (800) pages. This entire record was before the Trial Court and The Court of Appeals at their moments of decision.

Upon the record before it the Trial Court fairly examined the course of conduct of the parties over the period 1970 to 1974 and the manifest written expression of the parties, i.e. the Coal Supply Agreement and determined that the intention of the parties was to arbitrate any unresolved controversy arising under the agreement. In doing so the Trial Court, noting that there was no real dispute about the facts (Pet. A-16), could not accept Petitioner's attempts (Pet. A-18) to have the Court determine intent from one (1) isolated paragraph of one (1) provision of a coal supply agreement containing some thirty-seven (37) provisions in all, which taken together constituted a coherent and entire contract.

The Coal Supply Agreement dated February 6, 1969, was executed two (2) years after this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing Co.*, 388 U. S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967) and clearly evidenced a transaction in commerce as contemplated by The Federal Arbitration Act, 9 U.S.C., Sec. 1, *et seq.* The parties dealt with arbitration in the contract which contained a broad arbitration clause applicable to "any unresolved controversy between the parties, arising under this Agreement . . ." It also contained a provision making arbitration a condition precedent to all other remedies provided by law. An unresolved controversy

existed and the Petitioner admittedly refused to arbitrate (Vol. II, R-484).

Upon issues defined and agreed upon in open Court by the parties (Vol. II, R-483 to 486; Transcript, April 11, 1975, pp. 25-28) the Trial Court and The Court of Appeals have held against the Petitioner on the issue of arbitration.

Respondent therefore urges that the Memorandum Findings of Fact and Conclusions of Law of the Trial Court (Pet. A-14 to A-20) which were not found clearly erroneous by The Court of Appeals in its Opinion and Judgment (Pet. A-1 to A-13) justify affirmance of The Court of Appeals by this Court.

Finally, whether Respondent recovers any award from the Petitioner through arbitration is entirely dependent upon the conclusion of arbitration upon Respondent's claim which was a necessary predicate to its demands for arbitration to be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association and any award is subject to vacation under the supervision of the Courts if procured by fraud, undue means, partiality or corruption, misconduct, misbehavior, or abuse of power. Federal Arbitration Act, 9 U.S.C., Sec. 1, *et seq.*, Sections 9 and 10. The Petitioner in these proceedings has been and is the financially stronger party and any claim that arbitration constitutes injury is unsupported in the context of the record of this case, The Federal Arbitration Act and the applicable case law.

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QUESTIONS PRESENTED

Respondent is dissatisfied with Petitioner's presentation of the questions for review because the first question assumes *arguendo* elements of this case, such as intent and non-justiciability which are clearly inconsistent with the record and the Judgments of the lower Courts. Its second question also presents a question of fact which has already been determined by both lower Courts.

So far as evidence of intent or any matter of fact is concerned, the Petitioner rested its case in the Trial Court and questioned only the exclusion of evidence tendered on the issue of gross inequity which the Trial Court and The Court of Appeals held was the issue to be arbitrated (Pet. A-11, A-12 and A-19). Petitioner at that time thought "gross inequity" was justiciable by the Trial Court and this is inconsistent with its first question.

Petitioner's second question addresses itself to the fact of whether the language of the first paragraph of Section 26.01 viewed in a vacuum or out of the context of the entire contract and the course of dealings between the parties excluded gross inequities adjustments from arbitration. Again this was determined adversely by the lower Courts. The Petitioner's captious semantics as it deals with Section 26.01 on the issue of intent (Pet. 9, 10, 19, 20) must not be allowed to obfuscate the plain bargained-for language of the Coal Supply Agreement, and are unsupported by the entire record.

Correctly and fairly stated the issues are:

Whether The Court of Appeals in its Opinion reported at 526 F. 2d 101 (6th Cir. 1975) has:

(a) Rendered a decision in conflict with the decision of another Court of Appeals on the same matters

or

(b) Decided an important questiton of federal law which has not been, but should be settled by this Court.

STATEMENT OF FACTS AND OF THE CASE

No Statement of Facts or of the case is necessary because the facts and circumstances applicable to this case are those contained in the Memorandum Findings of Fact of The Trial Court (Pet. A-14 to A-20) which were affirmed by The Court of Appeals (Pet. A-1 to A-13) and are adopted by this Respondent.

Respondent also relies upon the foregoing with the following elaboration.

The Coal Supply Agreement dated February 6, 1969, contained the following arbitration clause (Pet. B-17):[2]

> 20.01 Arbitration. *Any unresolved controversy between the parties, arising under this Agreement shall, at the request of either party, be submitted to arbitration under the rules of The American Arbitration Association.* The costs and expenses of any arbitration shall be shared equally by the parties, unless otherwise ordered by the Arbitrator. (Emphasis supplied.)

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[2]This Agreement was executed two (2) years after the decision of this Court in the *Prima Paint* case, *supra*, four (4) years after the decision in *Necchi S.p.A.* v. *Necchi Sewing Machine Sales Corp.*, 348 F. 2d 693 (2d. Cir. 1965), cert. denied, 383 U. S. 909 (1966); and ten (10) years after the decision in *Robert Lawrence Co.* v. *Devonshire Fabric, Inc., supra.* Arbitration as a condition precedent to all other remedies has long been recognized as a major consideration for the execution of a contract. Cf. *Hamilton* v. *Liverpool and London and Globe Ins. Co.*, 136 U. S. 242, 255, 10 S. Ct. 945, 34 L. Ed. 419 (1890); *Hamilton* v. *Home Insurance Co. of New York*, 137 U. S. 370 (1890); *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corporation*, 70 F. 2d 297 at 299 (2d. Cir. 1933) aff'd 293 U. S. 449, 56 S. Ct. 313 (1935); *Kulukundis Shipping Co. S/A* v. *Amtorg Trading Corporation*, 126 F. 2d 978 at p. 984, 987 (2d. Cir. 1952).

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It also contained the following provision requiring arbitration as a condition precedent to any other remedy under the contract (Appendix to Petition B-18):

> 22.01 Remedies Cumulative. Remedies provided under this Agreement *shall be* cumulative and in addition to other remedies provided by law, *provided all such remedies shall be subject to the preceding requirement of arbitration.* (Emphasis supplied.)

The Coal Supply Agreement also contained, among other provisions dealing with adjustments thereunder, a provision for adjustments not contemplated by the parties at the time of the execution of the Agreement which is as follows (Pet. B-19-20):

> 26.01 Adjustments for Gross Inequities. Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of execution of this Agreement *may be* corrected by mutual consent. Each party *shall* in the case of a claim of gross inequity furnish the other with whatever documentary evidence *may be* necessary to assist in effecting a settlement. *Nothing contained in this Section shall be construed as relieving either the Purchaser or the Seller from any of its respective obligations hereunder solely because of the existence of a claim of inequity or the failure of the parties to reach agreement with respect thereto.* (Emphasis supplied.)

Finally, the Coal Supply Agreement was confined to its terms by the following provision (Pet. B-20):

> 28.01 Entire Agreement. This instrument contains the entire Agreement between the parties, and *there are no representations, understandings or agreements, oral or written, which are not included herein.* This

> Agreement cannot be changed except by duly authorized representatives of both parties in writing. (Emphasis supplied.)

In January 1974, Respondent, having received a request for escalation of coal deliveries under Section 7.01, expressed its concern over its ability to make those deliveries and the economic conditions rapidly increasing the cost of coal in the market, and requested a price adjustment under Section 26.01. This request was adamantly rejected by the Petitioner. In the Fall of 1974, upon Petitioner's rejection of its repeated request for a price adjustment, Respondent demanded arbitration under Section 20.01 and Petitioner refused. After an exchange of urgent communications, Petitioner filed its original Complaint against Respondent and sought damages for Respondent's alleged failure to deliver 355,977.60 tons of coal which Respondent would be required to replace under Section 27.01 (Pet. B-20):

> 27.01 Replacement Coal. In the event Seller fails to produce and tender for delivery coal from the reserves dedicated herein an amount of coal sufficient to meet the delivery requirements hereunder for the primary period, or any applicable option period, *Seller will supply coal of equal quality from other sources and upon the same terms and conditions herein.* (Emphasis supplied.)

Although Petitioner had known since January, 1974, that Respondent, due to economic conditions causing increases in the market price of coal as well as shortages of equipment, lacked equipment to meet its escalated deliveries it had never released Respondent from its obligation therefor, and Respondent's exposure to replace this coal in the Fall of 1974 at the then prevailing market prices was

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in excess of $10,000,000.00 or more than Respondent's net worth.

Respondent at all times before Petitioner's suit and thereafter in the Trial Court was willing to deliver its coal if Petitioner would just agree to arbitrate its claims and Petitioner's original Complaint, if sustained, would have crushed Respondent. Petitioner had not invited Respondent to a "pink tea party" by adamantly refusing to arbitrate and suggesting that Respondent sue Petitioner for "breach" or "to compel arbitration" (Vol. II, P. Exhibit 47, R-630-631, R-373-374).

Petitioner thereafter filed an Amended and Substituted Complaint seeking the equitable remedy of Declaratory Judgment for its protection by the Court on the issues of arbitrability and its breach for failure to arbitrate.

The parties agreed to a Status Quo Order (Vol. I, R-256-258; R-267-268).

It is in this context that the litigation was conducted on the merits as disclosed by the substantial record and numerous exhibits with the Trial Court invoking its general equitable power and the historical justness of equity to sustain Petitioner on all issues except the issue of arbitrability.

At the trial it was shown that Petitioner had a fuel adjustment clause in its rate structure that passes added fuel costs on to the consumer (Pet. p. 9). On Respondent's Motion for New Trial heard and denied April 11, 1975 (A C-1 to A C-2 *infra*) it was also shown that Petitioner during the Court proceedings claimed and was passing on to its customers the price adjustment of $6.50 per ton Respondent had sought before the Complaint was filed, but which Petitioner refused to pay to, or arbitrate with, Respondent and was required by The Public Service Commission of Georgia to refund upon discovery that the price

increase was not being paid to Respondent (Transcript April 11, 1975 page 21; Vol. II, R-801 to 807). Thus Petitioner's *ex post facto* gratuitous statement as to any special purpose for one paragraph of Section 26.01 (Pet. p. 9) warps the record and deprives the contract of mutuality of remedy so explicitly provided therein.

Appeal and Cross-Appeal were duly taken.

REASONS FOR OPPOSING THE WRIT

This case is controlled by the Federal Arbitration Act of 1925, 9 U.S.C., Sections 1 to 14 (1970). The Coal Supply Agreement here, entered into in 1969 for a long term of ten (10) years from January 1, 1970, evidenced a transaction involving commerce. The contract contained a written provision to settle by arbitration any unresolved controversy thereafter arising out of such contract. This provision was valid, irrevocable and enforceable save upon such grounds as exist at law or in equity for the revocation of any contract. An unresolved controversy existed which Petitioner refused to arbitrate (Vol. II, R-484). Arbitration under Section 20.01 was made a condition precedent to all other remedies by Section 22.01 and the second paragraph of Section 26.01 required the parties to observe all other provisions of the Agreement in case of a failure to reach agreement. These provisions, together with the course of conduct of the parties under the Agreement fully supported the Trial Court and The Court of Appeals in their fair and reasonable interpretation of the Coal Supply Agreement and their determination of the parties' intention to settle that unresolved controversy by arbitration if the parties could not reach any agreement thereon (Pet. A-6 to A-10).

The Court of Appeals has applied no rule of decision and made no determination which is not in complete con-

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formity with the clear legislative policy of the Congress, the prior decisions of this Court, or, which is in conflict with any controlling decision of The Court of Appeals for the Second Circuit.

Finally, although almost ten (10) years has passed since *Prima Paint,* the decision has gained almost universal acceptance as declaratory of the national substantive law and the power of Congress to prescribe how federal Courts are to conduct themselves with respect to commercial arbitration, over which Congress plainly has the power to legislate, intended to promote fair dealing and the early resolution of disputes. All of the purposes for The Federal Arbitration Act which existed in 1925 to serve businesses engaged in commerce exist to a greater degree today. Arbitration was a crucial part of the consideration for this long term commercial contract entered into by Respondent and by Petitioner and necessary for an effective and continuing relationship.[3]

Arbitration clauses have appeared in coal supply agreements for many years. Cf. *Shanferoke Coal & Supply Corp.* v. *Westchester Service Corporation,* 70 F. 2d 297 (2d. Cir. 1933) affirmed 293 U. S. 449, 59 S. Ct. 313 (1935). The Trial Court, which exercises its jurisdiction in The West Kentucky Coal Field, said in this case (A-18; Cf. Vol. II, R-516):

> "There is no magic to price adjustments in this long-term coal contract and certain types of adjustments have been provided under this contract. There is no

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[3]See Aksen, Legal Considerations in Using Arbitration Clauses to Resolve Future Problems Which May Arise During Long Term Business Agreements. Symposium—Presented at Annual Meeting of American Bar Association, San Francisco, California, August 16, 1972; Committee on Commercial Arbitration, Section of Corporation, Banking and Business Law, *The Business Lawyer,* January, 1973, pages 595-603.

claim or argument advanced by plaintiff that the price adjustments initially provided for, or subsequently provided for by amendments under 3.02, 3.03 and 3.04 would not have been subject to arbitration had the parties been unable to mutually agree thereon; so it seems to us that the fact that an adjustment under the gross inequity clause 26.01 not being arbitrable, as plaintiff would argue claiming such to be rewriting of the agreement, does not hold water—particularly where this agreement was drafted by the plaintiff, who, if it was not the intent of the parties that 26.01 be subject to arbitration, could have simply provided that 26.01 was not arbitrable. There is no provision to that effect."

This brings us to the consideration of the opinion of The United States Court of Appeals For The Sixth Circuit and its alleged conflict, if any, with the opinion of The Court of Appeals for the Second Circuit in the case of *Necchi S.p.A.* v. *Necchi Sewing Machine Sales Corp.*, 348 Fd. 693 (2d. Cir. 1965), cert. denied 383 U. S. 909 (1966).

Briefly, The Court of Appeals made the correct and proper application of *American Home Assurance Co.* v. *American Fidelity & Casualty Co.*, 356 F. 2d 690 (2d. Cir. 1966); *Aeronaves de Mexico S.A.* v. *Triangle Aviation Services, Inc.*, 389 F. Supp. 1388 (SD NY 1974) aff'd. 515 F. 2d 504 (2d. Cir. 1975) and *Beech Aircraft Corp.* v. *Ross*, 155 F. 2d 615 (10th Cir. 1946) and made a correct and proper distinction between the *Necchi* case and this case (Pet. A-7 to A-9):

"The present case is quite different from *Necchi.* There the parties sought to enforce a provision *for renewal* which did no more than require the parties to examine *the possibility of* entering into a new agreement. The dispute did not concern operations under the agreement and the language of the *renewal* provi-

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sion presented nothing for the arbitrator, or a Court, to enforce. On the other hand, in the case now under review a dispute arose during the life of a subsisting contract with respect to a present adjustment in prices on the basis of a condition *that was recognized by the parties* as a possibility when the contract was entered into. There is a difference between a provision which requires parties to attempt to agree on a new contract and one which requires them to attempt to (A-8) make an adjustment in price under an ongoing contract by mutual consent. Under the former situation in the absence of a new agreement there is no contract to enforce either by arbitration or judicial proceedings. In the latter case the parties remain bound to continued operations under their contract and the controversy over a claimed right to price adjustment must be settled somehow in the absence of mutual consent. In such a case if the contract provides for arbitration, the arbitrator is only required to resolve a controversy arising under the agreement of the parties, not write a new agreement for them.

"The mere fact that it provided for correction of gross inequities by mutual consent did not remove Section 26.01 from arbitrability. The *Necchi* Court has so held in cases where the fashioning of a renewal was not involved. In *American Home Assurance Co.* v. *American Fidelity & Casualty Co.*, 356F.2d.690(2d. Cir.1966), a contractual provision for a reduction of reinsurance premiums 'on a basis to be mutually arranged' was held to be arbitrable. In *Aeronaves de Mexico S.A.* v. *Triangle Aviation Services, Inc.*, 389F. Supp.1388(S.D. N.Y. 1974) aff'd 515 F.2d.504(2d Cir. 1975), a dispute under a provision that increases in charges for servicing airplanes 'will be negotiated to the satisfaction of both parties' was held to be arbitrable. Georgia Power's reliance upon *Beech Aircraft Corp.* v. *Ross*, 155 F.2d.615 (10th Cir. 1946) is misplaced. The contract under consideration in that case contained no arbitration provision. Under those cir-

> cumstances the Court held that a provision for price changes to be effected by 'mutual agreement', in the absence of a formula for final revision of price did not provide an acceptable standard by which a Court (A-9) could give effect to the intentions of the parties. The reasoning of the Court in the *Beech Aircraft* decision does not compel the same result in this case where the parties have agreed in advance to submit unresolved controversies to arbitration."

The holding of the Trial Court was to the same effect (Pet. A-17):

> "No one quarrels, least of all we, that for a dispute to be arbitrable there must have been a contractual agreement to arbitrate; however, the modern tendency seems to be that on the issue of what was agreed to be arbitrated, if 'fairly debatable' or 'reasonably in doubt', then such should go to arbitration. *Butler, supra.* Likewise, no one quarrels with the proposition, as expressed in the law of Georgia cited by the Plaintiff, and also in the *Necchi* v. *Necchi Sewing,* 348 F.2d.693, a contract to make a contract is not enforceable, but such is not the case here."

It is obvious that Petitioner has misjudged the *ratio decidendi* of the commercial arbitration cases. The *Necchi* case fully supports Respondent's case. Although *Necchi* dealt with the possibility of renewals *it also dealt with and sustained as arbitrable matters those disputes arising under the contract.* It recognized in 1965 (certiorari was denied in 1966) the Supreme Court's explicit and unanimous reservation of the question of arbitrability for the Courts (p. 696).

Two (2) years before the Coal Supply Agreement was executed, *Prima Paint, supra,* clearly established: that the Federal Arbitration Act created a "national substantive

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law" governing even in the face of contrary state law; that a purpose was to make arbitration agreements as enforceable as other contracts but not more so; and, that a lower federal Court should determine: first, the question of whether the agreement is the kind of agreement specified in The Federal Arbitration Act; second, the issues relating to the making and performance of the agreement to arbitrate; and third, to apply the rules enacted by Congress with respect to matters—here, a contract involving commerce—over which it has legislative power. Hence, upon the basis of *Prima Paint, supra,* contracts involving commerce which contained arbitration clauses, previously treated as second class contracts because of the hostility of the Courts, are now upon a par with other contracts in order to bring good faith to the market place and avoid welching at the whim of a recalcitrant party which desires that its dispute be subject to delay and obstruction in the Courts the exact opposite of what *Prima Paint, supra* (p. 404), honored as the plain meaning and unmistakable clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the Courts.

A succession of cases from The Second Circuit brought about the elevation of second class commercial contracts to the status of other contracts. Judicial hostility and State law had posed problems up until *Prima Paint's* clear acceptance of the "national substantive law" of commercial arbitration. The State of Georgia in *West Point-Pepperell, Inc.* v. *Multi-Line Industries, Inc.,* Ga., 201 S. E. 2d 452 (1973) cited in Judge Lively's opinion (Pet. A-12) *recognized the preemption of The Federal Arbitration Act and yielded its state law and policy on arbitration to the paramount federal law one (1) year before this litigation was instituted by Petitioner in the Trial Court where Petitioner*

argued that the law of Georgia prevented arbitration (Vol. II, R-484, R-485, R-486).

If arbitration under Section 20.01 of any unresolved controversy arising under any provision of the Coal Supply Agreement including Section 26.01 was contrary to Georgia law and not arbitrable as argued by Petitioner then it was deceptive and misleading for Petitioner to include the language in the Agreement without affirmative exclusory provisions.

In the series of Second Circuit cases culminating in *Prima Paint,* are: *Shanferoke Coal & Supply Co.* v. *Westchester Service Corp.,* 70 F. 2d 297 (2d. Cir. 1933) affirmed 293 U. S. 449, 56 S. Ct. 313 (1935); and, *Bernhardt* v. *Polygraphic Co. of America,* 218 F. 2d 948 (2d. Cir. 1955), reversed 350 U. S. 198, 76 S. Ct. 273 (1956). Other cases from the Second Circuit were: *Kulukundis Shipping Co. S/A* v. *Amtorg Trading Corporation,* 126 F. 2d 978 (2d. Cir. 1952); *Albatross SS Co., Inc.* v. *Manning Bros., Inc.,* 95 F. Supp. 459 (SD NY 1951); *Robert Lawrence Co.* v. *Devonshire Fabric, Inc.,* 271 F. 2d 402 (2d. Cir. 1959), certiorari dismissed under Rule 60, 364 U. S. 807 (1960); and, the *Necchi* case (1965) discussed above. These cases hold that the District Court has jurisdiction to determine whether the parties had made an agreement to arbitrate and whether the issues raised are within the reach of the agreement; address themselves to the history and policy of the Federal Arbitration Act and the prior decisions of this Court; and suggest a liberal policy to promote arbitration to accord with the original intention of the parties and to help ease the current congestion in Court calendars. It is in the *Necchi* case that the Second Circuit cites (p. 696) the cases of *United Steelworkers* v. *Warrior & Gulf Nav. Co.,* 363 U. S. at 582, 80 S. Ct. at 1353 (1960) and *John Wiley & Sons, Inc.* v. *Livingston,* 376 U. S. 543, 547, 84 S. Ct. 909, 11 L. Ed. 2d 898 (1964)

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in support of the principle that arbitration in collective bargaining and in commercial contract cases is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to so submit.

Petitioner concedes (Pet. 19) the strong federal policy supporting arbitration in both fields and concedes the presumption favoring the arbitration of disputes and then argues (Pet. 19-21) that the language of the first paragraph of Section 26.01 provides "positive assurance" that it was to be excluded from and withdrawn from, the broad provision of Section 20.01. This challenge to the Sixth Circuit's opinion *has no support in the record* or in the language of Sections 20.01, 22.01, 26.01 (2nd par.) and 28.01 of the Coal Supply Agreement *which clearly provided both lower Courts with "positive assurance" of arbitrability.* It was clear that arbitration under the second paragraph of Section 26.01 was an obligation of the parties, that arbitration was a condition precedent under Section 22.01, and, that arbitration applied to any unresolved controversy under Section 20.01. *It is unnecessary for this Honorable Court to sit at nisi prius on the issue of intent to arbitrate which has already been resolved by both lower courts.*

Petitioner cites no case decided since *Prima Paint* and there are only three significant cases for consideration. These are *Necchi, supra; Prima Paint, supra,* and *West Point-Pepperell, Inc.* v. *Multi-Line Industries, Inc.*, Ga., 201 S. E. 2d 452 (1973) the latter case completely rebutting all of Petitioner's arguments in the Trial Court that state law was applicable (Vol. II, R-484 to R-486).

Petitioner cites two (2) law review articles which are more deserving of the label *"ipse dixit"* than the unanimous opinion of three (3) member panel of The Sixth Circuit to which Petitioner has ascribed it (Pet., p. 12). The article at 52 Boston L. Rev., 571 (1972) was designed to provide

legal and equitable defenses for recalcitrant clients (footnote 21, p. 575):

> *"When a client becomes recalcitrant as to the performance of his agreement to arbitrate or denies having made the agreement to arbitrate the present dispute, his attorney may feel his cause is better served by suit in Court with the attendant protection of judicial proceedings. Therefore, ability to defend against these motions and to foresee the interpretation of an agreement to arbitrate may assume significance."* (Emphasis supplied.)

Petitioner also failed to follow the article as to its conclusory admonishment (p. 598):

> ". . . *Real protection for a client, however, can only be afforded at the drafting stages."* (Emphasis supplied.)

The other law review article, 1 Ga. L. Rev. 363 (1967) was written without benefit of *Prima Paint, supra,* and assumed a judicial hostility toward arbitration in commercial contracts apparently endorsed by Petitioner who refers (Pet., p. 9) to it as the ". . . *free wheeling environment of an arbitration proceeding* . . ." This attitude has no place under the Federal Arbitration Act or the applicable case law.

The opinion of The Court of Appeals For The Sixth Circuit is not at conflict with any decision of the Second Circuit or of this Honorable Court and this Court in *Prima Paint* has spoken clearly and unmistakably as to the role of the lower Courts in commercial arbitration matters. It is clear that the Trial Court and The Court of Appeals have observed that role in this case, having fairly determined the intent of the parties to arbitrate their dispute from evidence, contract language and tests that are applicable to contracts generally.

BLEED THROUGH

CONCLUSION

The Petition For Certiorari should be denied.

Because arbitration was a condition precedent to legal remedy under the Coal Supply Agreement, Respondent's defense of rescission for repudiation or breach of contract was based upon the cases of *Hamilton* v. *Liverpool and London and Globe Ins. Co.* (*supra,* footnote 2); and *Hamilton* v. *Home Insurance Co. of New York,* 137 U. S. 370 (1890). This defense was within the scope of the *Jureidini* doctrine (1915) referred to first in *The Atlanten,* 252 U. S. 313, 40 S. Ct. 32, 64 L. Ed. 581 (1920); was not passed upon by the Second Circuit or this Court in the *Shanferoke* case, *supra;* and was discussed as an open question by the Second Circuit in *Kulukundis, supra;* Cf. *Galt* v. *Libby-Owens-Ford Glass Co.,* 376 F. 2d 711 (2d. Cir. 1967).

Respondent accepted the equitable principles applied by the lower Courts to its defense of rescission because of Petitioner's prior breach based upon their power under the Federal Rules of Civil Procedure in a declaratory judgment action. Respondent does not agree with the lower Court's reasoning as to its legal defense of rescission. Therefore, equity in this case follows the law and should the Petition be granted, Respondent asks that this Honorable Court exercise its sound judicial discretion to hear it as to the legal defense of rescission.

Respectfully submitted,

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Counsel For Respondent

APPENDIX

BLEED THROUGH

APPENDIX "C"

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

GEORGIA POWER COMPANY,
Plaintiff,

v.

CIMARRON COAL CORPORATION,
Defendant.

Civil No. C 74-107-0

ORDER

This matter came on for hearing on Friday, April 11, 1975, at Owensboro, Kentucky, on the defendant's motion for a new trial and question of record designation on appeal and there appeared Hon. Martin Roach and Hon. Michael C. Murphy on behalf of the plaintiff and Hon. William Nisbet, Hon. W. Stuart McCloy, Sr., and Hon. W. Stuart McCloy, Jr. on behalf of the defendant.

Both sides having announced ready and having presented their arguments, and the Court being sufficiently advised,

IT IS ORDERED that the defendant's motion for a new trial be, and it hereby is, OVERRULED.

Order

IT IS FURTHER ORDERED that nothing shall be designated and included in this record by the Clerk that was not filed and introduced into the record on the trial date.

JAMES F. GORDON
United States District Judge

April 11, 1975

ENTERED April 11, 1975,
August Winkenhofer, Jr.,
Clerk
by W. Hatcher, Deputy
Clerk.

Copies to: Hon. Martin Roach
Hon. Michael C. Murphy
Hon. J. Kirk Quillan
Hon. W. Stuart McCloy, Sr.
Hon. W. Stuart McCloy, Jr.
Hon. Richard L. Frymire
Hon. William Nisbet

BLEED THROUGH

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

GEORGIA POWER COMPANY,
Plaintiff,
v.
CIMARRON COAL CORPORATION,
Defendant.
} Civil No. C 74-107-0

AGREED DESIGNATION OF RECORD

After a hearing on April 11, 1975, the plaintiff and the defendant agreed on a designation of the record. The parties agreed that all items listed as docket entries except the following docket entries shall be included in the record on appeal in the case:

No. 20 through 24 excluded.
No. 26 through 36 excluded.
Tendered Proposed Findings of Fact and Conclusions of Law.

This April 11, 1975.

AGREED TO:
MICHAEL C. MURPHY, Attorney for Plaintiff
W. STUART MCCLOY, SR., Attorney for Defendant.

Agreed Designation of Record

FILED
AUGUST WINKENHOFER, JR., Clerk
April 11, 1975
U. S. District Court
Western District of Kentucky

FILED
Dec. 9, 1975
John P. Hehman, Clerk

FILED
August Winkenhofer, Jr.
Clerk
March 10, 1976
U. S. District Court
Western Dist. Kentucky

BLEED THROUGH

C-5

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

Nos. 75-1542
75-1543

GEORGIA POWER COMPANY, - - *Plaintiff-Appellant, Cross-Appellee,*

v.

CIMARRON COAL CORPORATION, - *Defendant-Appellee, Cross-Appellant.*

Before: PHILLIPS, Chief Judge; MILLER and LIVELY, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Western District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

No costs taxes.

ENTERED BY ORDER OF THE COURT.
John P. Hehman, Clerk

Issued as Mandate: March 5, 1976
COSTS: None

A True Copy.
Attest:
Darlene Koenig, Deputy Clerk

CERTIFICATE OF SERVICE

This is to certify that I have this day served Counsel for Petitioner in the foregoing matter with three copies of Brief for Respondent in Opposition by depositing same in The United States Mail with adequate postage thereon, addressed to:

Allen E. Lockerman
Michael C. Murphy
J. Kirk Quillan
Ralph H. Greil
Troutman, Sanders, Lockerman & Ashmore
1400 Candler Building
Atlanta, Georgia 30303

and

Martin Roach, Esquire
Roach, Cox & Brown
2615-16 Citizens Plaza
Louisville, Kentucky 40202

this 2nd day of April, 1976.

(s) W. Stuart McCloy, Sr.
Attorney for Respondent
Cimarron Coal Corporation